IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH NAGPUR

Second Appeal No.545/2006

Office Notes, Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders. : Court's or Judge's orders

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CORAM : A.P. Lavande, J.
Dated : 29/09/2006

This second appeal has been preferred by the legal representatives of Dr. M. S. Phendharkar, original defendant no.1 against judgment and decree dated 19.4.2006 passed by First Adhoc Additional District Judge, Gondia in Regular Civil Appeal No.2 of 2003 dismissing the appeal preferred by original defendant nos. 4 and 5 against judgment and decree dated 5.9.2002 passed by Civil Judge, Senior Division, Gondia in Special Civil Suit No. 39/1999.

Briefly, the facts which are relevant for deciding the present appeal are

as under:-

Respondent no.1 filed the above suit against Dr. M.S. Phendharkar and respondent nos. 2 to 5 who were defendant nos. 2 to 5 seeking declaration and compensation. According to plaintiff, on 26.9.1996 she underwent tubectomy operation at Kalimati. The operation was done in pursuance of the family programme organized by Zilla Parishad, Bhandara. According to plaintiff, original defendant no.1 Dr. Phendharkar keeping her in dark got her operated and operation was carried out by Dr. Makade under the guidance of Dr. Dhakate without her consent. After about 20 to 21 months of the operation, the menstruation stopped and she got herself examined by defendant no.1 who referred her to defendant no.2 to confirm pregnancy. It is the case of defendant no.1 that the plaintiff contacted him and complained to him about the stoppage of menstruation. On examination, he realised that plaintiff had

conceived and, therefore, he gave medicine for starting menstruation. However, expected results could not come out and, therefore, she was referred to defendant no. 2 for further confirmation. It is further the case of defendant no.1 that he advised the plaintiff and to her husband to get the pregnancy terminated, however, they did not agree. According to plaintiff, she thereafter consulted lady doctor who confirmed that she was 20 weeks pregnant and since it was not safe to go for termination of the pregnancy, the plaintiff did not terminate pregnancy and thereafter a child was born.

The suit was contested by the defendants by filing written statement. After appreciating the evidence led by the parties the trial Court held that defendant no.1 had admitted that he had given treatment to the plaintiff. The defendant no.1 admitted that plaintiff had contacted him after about two months from stoppage of menstruation period and that he was in

doubt if the plaintiff was carrying pregnancy or not. Defendant no.1 further admitted that he had treated the plaintiff.

Mr. Bhandarkar, learned counsel for the appellants submitted that the judgments passed by both the Courts below are vitiated inasmuch as the trial Court as well as the lower appellate Court based the findings on facts which were not pleaded. He further submitted that the trial Court erred in framing an Issue as to whether the plaintiff was compelled to bear the unwanted fourth child due to negligence of defendants, in the absence of any pleadings thereof. He further submitted that the lower appellate Court fell in error in framing first point for determination i.e. whether the plaintiff was required to bear the unwanted child due to negligence of defendant no.1. He further submitted that no negligence was established against the appellant-defendant no.1 by the plaintiff and, therefore, the decree could not have been passed against the appellant. In

support of his submissions, learned counsel relied upon the judgment of the Apex Court in the case of State of Punjab Vs. Shiv Ram and others (AIR 2005 Supreme Court 328).

Mr. Bhandarkar further submitted that compensation of Rs. 50,000/- granted against defendant nos. 1, 3 and 4 which has been confirmed by the lower appellate Court is without any basis.

Before considering the submissions made by learned counsel, it would be appropriate to refer to para 6 of the judgment of the Apex Court in Shiv Ram's case (supra) relied upon. The Apex Court after referring to the decision of Apex Court in Jacob Mathew V. State of Punjab and Anr. (2005) 6 SCC 1 culled out the principles from Jacob Mathew case, which read as under:-

“(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing

something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three :`duty', `breach' and `resulting damage'.

(2) A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of

taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

(3) A professional may be held liable for negligence on one of the two findings; either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that

cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment or negligence".

The submissions made by Mr. Bhandarkar will have to be tested in the light of the principles culled out by the Apex Court having regard to the facts and circumstances of the present case. The appellate Court, after referring to the evidence oral and documentary led by the parties, as well as admission made by defendant no.1 in his evidence held that it has been established that the plaintiff had contacted defendant no.1 in July 1998 and complained him regarding missing of menstruation cycle. This finding has been recorded on the basis of reply dated 25.5.1999 sent by defendant no.1 to notice sent by the plaintiff. The lower appellate Court has further held that after the plaintiff contacted defendant no.1 and complained to him about missing of the menstruation cycle, defendant no.1

represented to her that the missing of menstruation cycle might be due to anemic condition and he prescribed the treatment to recover her from the weakness for a period of two months. Inspite of the treatment the plaintiff had no menstruation and, therefore, he suspected that she was carrying pregnancy. So the defendant no.1 changed the line of treatment and prescribed cyclonarm EB medicine for restarting menstruation and he continued this treatment for about one month but with no favourable results. There is evidence on record that since the treatment of appellant did not yield any result, she contacted Dr. Mrs. Salam at Gondia who diagnosed that the plaintiff was carrying pregnancy of about 4½ months and abortion at such stage could be risky to her life. In the cross-examination defendant no.1 specifically admitted that when the plaintiff visited him again after being examined by Dr. Mrs. Salam, she was already carrying pregnancy of 21 weeks. In reply notice

dated 25.5.1999 sent to the plaintiff, defendant no.1 specifically admitted that the plaintiff and her husband had visited him and Dr. Mrs. Salam to terminate the pregnancy. In view of this clear evidence, the finding of the trial Court which has been confirmed by the lower appellate Court that the plaintiff had to bear unwanted forth child cannot be said to be perverse warranting interference in second appeal. Moreover, the evidence led by the plaintiff and defendant no.1 coupled with the admission of defendant no.1 clearly establishes that even in the month of July 1998 when the plaintiff approached the appellant, he gave treatment for about two months on the footing that on account of weakness menstruation of the plaintiff had stopped and this treatment was continued for a period of two months. It is only thereafter that the appellant prescribed medicine for restarting menstruation which did not yield result. This conduct on the part of the appellant clearly constitutes

negligence in terms of the principles laid down by the Apex Court in the case of Jacob Mathew (supra). It was expected of defendant no.1 to diagnose pregnancy or to refer her to the competent Doctor who could diagnose whether the plaintiff had recovered notwithstanding the operation carried out in September 1996. The evidence on record, therefore, clearly discloses that there was a duty on the part of the defendant no.1 to either diagnose the pregnancy and give proper treatment or to refer her to competent Doctor for further treatment in case the defendant no.1 himself was not able to give relief to the plaintiff thereby resulting in breach of duties which ultimately resulted in damage by compelling the plaintiff to have 4th unwanted child. Insofar as the quantum of compensation is concerned, I do not find any illegality in the finding recorded by the trial Court while awarding compensation of Rs. 50,000/- in favour of the plaintiff which has been confirmed by the lower appellate

Court. I am unable to accept the submissions of Mr. Bhandarkar that the lower appellate Court fell in error in framing point for determination as to whether the plaintiff was required to bear the unwanted child due to negligence of defendant no.1. Insofar as the submission of Mr. Bhandarkar that the findings of both the Courts below are based on facts not pleaded is concerned, no doubt, the plaintiff in the plaint has not mentioned about the treatment given to her by defendant no.1 after she contacted the defendant no.1 in July 1998. But the fact remains that it is the case of defendant no.1 himself that he gave treatment to her which did not give results. Therefore, since the findings of both the Courts are based on admission of defendant no.1 himself, no fault can be found with the finding given by both the Courts below regarding negligence on the part on the part of defendant no.1.

In the light of above discussion, the findings of both the Courts below that

negligence on the part of defendant no.1 has been proved by the plaintiff cannot be faulted. That being the position, the ratio laid down by the Apex Court in Shiv Ram's case (supra) relied upon by the appellants, does not support the contentions made on behalf of the appellants. Moreover, it is pertinent to note that the appeal before the lower appellate Court was filed by original defendant nos. 3 and 4 and not by defendant no.1.

Taking over all view of the matter, I do not find any perversity in the findings recorded by both the Courts below. I do not find any substantial question of law involved in the appeal. Therefore, no interference is called for. Hence, the appeal is rejected.

JUDGE

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